IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 709.

STEWART-JORDAN DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

ARGUMENT.

Respondent's Arguments Bring In to Clear Focus the Importance of the Questions Herein Presented and That They Warrant Review by This Court.

Although attempting to minimize the importance of the questions involved in this case as an argument for the Court not granting the Writ of Certiorari, the arguments of Respondent sum up to the contention that a different concept and different principles exist under the Fair Labor

Standards Act for determining what is "in commerce"—in particular as to when interstate commerce begins—than apply under other federal acts in which coverage is dependent upon an employee or an activity being "in commerce" and under other decisions of this Court as to what constitutes interstate commerce.

(1) Respondent argues (Respondent's Brief, Point 3, Pages 9-10) that, since *Coe* v. *Errol*, 116 U. S. 517[1] and *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36 and *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40, did not arise under the Fair Labor Standards Act, the holdings in these cases as to when an interstate journey commences are not applicable to the instant case. The latter two cases arose under the Federal Employers' Liability Act, prior to the 1939 amendment, and when the act "applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce'." *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 128.

The question raised by Respondent's argument is: In determining whether an employee is "engaged in commerce" for the purpose of coverage under the Fair Labor Standards Act, are there different principles and a different concept of what constitutes interstate commerce than there is under the Federal Employers' Liability Act in determining whether an employee is "in commerce"?

In *Overstreet* v. *North Shore Corporation*, 318 U. S. 125-128 this Court in determining whether an employee was engaged in an activity so closely related to interstate transportation as to be "in commerce," said: "A practical test of what 'engaged in interstate commerce' means has been evolved in the cases arising under the Federal Employers' Liability Act (45 U. S. C. 51, *et seq.*, 45 U. S.

1. For other cases following *Coe* v. *Errol* see page 10 of Petition for Certiorari.

C. A. 51, *et seq.*)" before the 1939 amendment. In *McLeod v. Threlkeld*, 319 U. S. 491, though disagreeing as to whether a certain case under the Federal Employers' Liability Act had been subsequently nullified by a later decision of the Court under that act, both the majority and dissenting members of the Court agreed that, as stated in the majority opinion on page 495, "* * * the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employment 'in commerce' under the Fair Labor Standards Act."

Respondent apparently does not deny but accepts this Court's holding as to the applicability of cases under the Federal Employers' Liability Act, prior to the 1939 amendment, so far as concerns a determination of whether an employee is engaged in an activity so closely related to interstate transportation as to be engaged in such interstate transportation or commerce. Yet Respondent argues that this Court's holdings as to when interstate transportation commences for purpose of determining whether an employee is in such commerce under the Federal Employers' Liability Act, prior to 1939 amendment (*McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36; *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40), do not apply in determining when an interstate transportation or journey begins for the purpose of determining whether an employee is "engaged in commerce" under the Fair Labor Standards Act.

Do the cases arising under the Federal Employers' Liability Act, prior to the 1939 amendment, apply in determining whether an employee's activities are so closely related to interstate transportation that the employee is "engaged in commerce" under the Fair Labor Standards Act but such cases do not apply in determining when in-

terstate transportation and commerce begins for the purpose of coverage under the Fair Labor Standards Act?

(2) Respondent relies entirely on *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (Respondent's Brief, p. 6), to sustain the judgment of the Court of Appeals and the majority opinion. A brief statement of the holding in that case brings into focus the questions raised by Respondent's position in this regard.

In the *Jacksonville Paper Co.* case goods were received by a wholesaler from manufacturers outside of the State. There was no question but that the goods when delivered to the wholesaler were in interstate commerce. No question was involved as to when interstate commerce begins. The question was whether the interstate journey ended after these goods from outside the State had been received by the wholesaler in his warehouse and whether the employees engaged thereafter in handling and delivering these goods were engaged in interstate commerce. This Court held that: (a) Goods purchased from without the State to fill special orders of customers and goods similarly purchased from without the State imprinted with the name of the customer or to meet the specific needs of certain customers and which were purchased to fill prior orders and contracts of customers, remained in interstate commerce until delivered to the customer, though temporarily held in the wholesaler's warehouse to await delivery: (b) As to goods purchased from without the State to meet the anticipated needs of customers, but which were not purchased pursuant to a prior order on contract, the interstate journey of these goods ended when they came to rest in the wholesaler's warehouse and that the subsequent handling, sale and delivery of the same were in intrastate commerce and that the employees who handled or sold or delivered these latter goods were not "engaged in commerce" and were not subject to the Fair Labor Standards Act.

The first of these two holdings is relied on by respondent. This holding, however, was not a new one or one of peculiar application to the Fair Labor Standards Act, but followed the principles laid down in *Champlain Realty Co. v. Town of Brattleboro,* 260 U. S. 366 (1922), and earlier decisions of this Court that, as stated in the *Jacksonville Paper Co.* case, once the goods have entered the channels of interstate commerce, "if the halt in the movement of the goods is a convenient intermediate step in the process of getting them into their final destinations, they remain 'in commerce' until they reach those points." Similarly, the second of these two holdings in the *Jacksonville Paper Company* case followed the long standing principle that an interstate journey ends when goods come to rest in the warehouse under no pre-existing orders or contract and for no particular customer.

At the same time as this Court in *Jacksonville Paper Co.* case was following the principles laid down in the earlier cases as to when the interstate journey or commerce ends, there was also existing the principles as to when the interstate journey or commerce began. These latter principles had first been laid down in *Coe* v. *Errol,* 116 U. S. 517 in 1886 and had been consistently followed by this Court without waivering in all subsequent cases including those cited on page 10 of the Petition for Writ of Certiorari. The cases there cited include ones decided by this Court before and after the *Jacksonville Paper* case.

Respondent argues that *Coe* v. *Errol* and the subsequent cases cited, including those under the Federal Employers' Liability Act, as to when an interstate journey or interstate commerce begins, do not apply under the Fair Labor Standards Act. This argument poses this question:

Since, in determining when an interstate journey ends for the purpose of the Fair Labor Standards Act, this

Court has followed the earlier concepts and principles in effect when the Act was passed, should this Court for the purposes of the Act follow the same principles and concept as to when an interstate journey or commerce begins as were in effect at the time the act was passed by Congress or should the Court adopt a new concept and new set of principles as to when an interstate journey or commerce begins?

3. When Congress enacted the Fair Labor Standards Act, the rule laid down in *Coe* v. *Errol* as to when interstate commerce began had consistently been followed by the decisions of this Court (cases cited page 10 of Petition for Certiorari). This fact and respondent's argument raise this question.

Did Congress, in enacting the Fair Labor Standards Act and in providing therein that employees "engaged in commerce" should be subject to the Act intend to have the phrase "in commerce" mean the same as had been attributed to that phrase "in commerce" in other federal acts, and intend to have the same concept and principles apply in determining when interstate commerce ends and when it begins as then existed under the decisions of this Court?

The answer to the question concerning the applicability of the cases decided by this Court under the Federal Employers' Liability Act, prior to the 1939 amendment, is found in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125. In that case this Court said at 131-132:

> "We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the Pedersen and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

(4) Defendant argues that *Coe* v. *Errol*, 116 U. S. 517, and certain subsequent cases, as to when an interstate journey begins, are not applicable as those cases involved the right of the state to tax certain goods within its boundaries (Respondent's Brief, page 9). It is true that *Coe* v. *Errol* involved the right of a state to tax. As there has been considerable general language used in opinions as to the advisability of using tax cases as authority in other fields, it is necessary that we analyze these statements.

It has been said and rightly so that: "Decisions * * * dealing with various assertions of state or federal power in the commerce field are not particularly helpful in determining the scope of the Act [Fair Labor Standards Act]." *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 132. That is so because in the Fair Labor Standards Act "Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce" (318 U. S. 125, 128). This does not mean that decisions involving the fields in which Congress has legislated by the Fair Labor Standards Act, *i. e.*, interstate commerce and production of goods for interstate commerce, are not applicable.

It is true that tax cases are not always helpful in determining what is in interstate commerce, but it is important to know the reason for this. It is because goods or activities in interstate commerce may be taxed so long as such tax does not place "an unconstitutional burden on interstate commerce." *Kirschbaum* v. *Walling*, 316 U. S. 517, 521.

However, when this court holds that a state may tax certain goods or activities because they are *not* in interstate commerce, because the interstate journey has not begun, as in *Coe* v. *Errol*, that is entirely different from saying that a state can tax goods even if they are in interstate commerce. If the activities of employees or the

goods when handled by such employees are not in interstate commerce because the interstate journey has not commenced, this is equally true whether the question involved is one of taxation or is one as to whether employees are "in commerce" under the Federal Employers' Liability Act or the Fair Labor Standards Act. To our knowledge it has never been held or even hinted by this Court that there are two or more different concepts of what is interstate commerce or when an interstate journey begins or ends, depending on whether a tax, Federal Employers' Liability Act or a Fair Labor Standards Act case is involved.

At least in the cases under the Federal Employers' Liability Act, prior to the 1939 amendment, this Court adopted with approval the principles of *Coe* v. *Errol* as to when an interstate journey begins. *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36; *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40. Later under the Fair Labor Standards Act, this Court adopted and followed its decisions under the Federal Employers' Liability Act as to what the phrase "engaged in commerce" means. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128-130; *McLeod* v. *Threlkeld*, 319 U. S. 491, 495, 498.

II.

The Empty Bottles and Cases Were Not Specifically Marked for an Out-of-State Destination When They Were Picked Up by the Driver-Helpers of Petitioner and Returned to Petitioner's Warehouse. Such Statement in Respondent's Brief Is in Error.

Under "Question Presented" on page 2 of Respondent's Brief it is stated that the beer bottles and cases which the driver-helpers of petitioner pick up from the retailers are "specifically so marked for the out-of-state-destination." The bottles and cases are not so marked.

In the first place these empties have not been invoiced, no bill-of-lading has been issued and no sale of them has been made at the time they are picked up by the driver-helpers from the retailers or when they are returned to petitioner's warehouse. Petitioner is free to dispose of these empties to whomever it chooses or not to dispose of them at all (Rec. 94).

As to the empty returnable bottles, the testimony only is that the helpers picked up brown bottles (Rec. 45, 57, 83). These might have labels on them of any number of different brewers as most brewers use brown bottles, white and green ones being in the minority. Furthermore even if these brown bottles have on them the label of one of the brands handled by petitioner, these are paper labels glued to the bottle. They wash off easily and are always washed off before they are refilled. These bottles can be used by and can be sold to most of the brewers or to other buyers for resale to any number of different users.

Though the cases might have a brewer's name on them, they are cardboard cases with a limited period of re-use. The principal function of the case is to have a package in which to ship the empty bottle. These cases can be sold to and used by any other brewer or manufacturer or other packager. Such other purchaser need only paste a paper label over the brand name printed on the case.

It cannot be said in any sense that when these empty cases and returnable bottles are picked up at the retailer's place of business and returned to petitioner's warehouse that they are marked for an out-of-state-destination.

That the petitioner's intention may be to sell and ship them to one of the out-of-state breweries whose products it sells, does not place these empties in interstate commerce when the driver-helpers pick them up at the retailer's place of business and return them to the wholesaler's

warehouse. "Although intended for exportation they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place outside of the state or committed to the custody of the carrier for transportation to such place, * * *" they remained in intrastate commerce. "The carrying of them in cars or other vehicles * * * to the depot [warehouse] where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation." *Coe* v. *Errol*, 116 U. S. 517, and the other cases cited on page 10 of Petition of Writ for Certiorari.

Conclusion.

It is respectfully submitted that the decision below is erroneous and the questions presented on the record in this case are of such substance and general importance as to necessitate review by this Court.

Respectfully submitted,

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